

## LETTERS TO THE EDITOR

# Criminal Law and Parasomnias: Some Legal Clarifications

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Recently, several authors have published discussions on forensic sleep disorders and relevant aspects of criminal law. We are concerned that legal discussion contained therein is inaccurate. While some of these errors may be of little importance, others may directly impact the presentation of expert evidence in court and trial direction. We would like to clarify several important points.

### ACTUS REUS AND MENS REA

Several papers have attempted to explain the legal concepts of *actus reus* (“guilty act”) and *mens rea* (“guilty mind,” generally categorized as purpose (or intent), knowledge recklessness or negligence (US Model Penal Code Section 2.02). These are the two required elements required for the criminal offence to be “made out” (unless it is a strict liability offence, where no *mens rea* is required); that is, without these elements, there is no criminal offence.

Mahowald, Schenck, and Cramer Bornemann state: Anglo-American law has traditionally defined criminal offenses as requiring both an *actus reus* and a *mens rea* in order to secure a conviction. Essentially, *actus reus* is the physical component of the alleged offense while *mens rea* attempts to define the required state of mind. The state must prove both that the accused physically performed the act at the appropriate place and time and that he or she must have been in a certain mental state, or have had a “guilty mind”, necessary to have committed the crime. In criminal cases attempting to employ the “sleepwalking defense”, the component involving *actus reus* is usually not under debate.<sup>1</sup>

Unfortunately, this statement does not reflect the complexity of this area of criminal responsibility. Their statement is ambiguous—on the one hand, they appear to suggest that *actus reus* is not in question in most sleep walking cases. If this were the case, they have conflated the illegal act and the *actus reus*, which is incorrect (although there are some common law jurisdictions e.g. New Zealand where there is uncertainty whether automatism is a denial of *actus reus* or *mens rea*<sup>2</sup>). If they mean that the *actus reus* requirement has not been satisfied, then the *mens rea* is irrelevant because the first element of the

offence has not been proved—both the *actus reus* and the *mens rea* are required for the offence to be made out.

There is a similar statement by Siclari et al.:

Sleep-related automatisms that occur in the course of parasomnias or seizures usually qualify for diminished responsibility because the person is not conscious of his act, its consequences and of the fact that it is wrong. A criminal conviction in many western countries is secured upon proving two essential elements: *mens rea* (guilty mind) and *actus reus* (the accomplished act). In alleged violent behaviour arising from sleep, *actus reus* is usually never in doubt, whereas the medical expert will need to provide compelling arguments related to *mens rea*, or the claimant’s degree of consciousness. Applying this concept to a particular act can be problematic for a variety of reasons.<sup>3</sup>

The statement about diminished responsibility is puzzling, since the law is quite clear that automatism involves no responsibility (unless there are other issues such as prior fault). Siclari et al. make the same error as Mahowald, Schenck, and Cramer Bornemann about the definition of *actus reus*. The *actus reus* requires more than the mere physical performance of the illegal act—it requires a voluntary and willed act. Sleepwalking episodes would not satisfy this requirement. This issue is particularly important with crimes of strict liability.

Doghranjji, Bertoglia, and Watson correctly describe the *actus reus* as including the “voluntariness requirement” (that the act was the product of the mind and will of the defendant—it does not require a lack of duress) and state that sleepwalking acts do not satisfy the *actus reus* requirement. They also correctly identify that sleepwalking can be the basis of a defence of lack of *mens rea*.<sup>4</sup> Either way, the offence is not made out.

### TRIAL DETERMINATIONS

Doghranjji, Bertoglia, and Watson have commented on the basis of the convictions and acquittals in the cases of *Parks*,<sup>5</sup> *Falater*, and *Reitz*<sup>6</sup> but paradoxically fail to include the reasoning of a jury in *Tirrell* where it was available (the jury stated sleepwalking did not enter into their considerations<sup>7</sup>). In our opinion, no inferences should be made if the deliberations of the respective juries are not known.

## IMPORTANCE OF CLINICAL DIAGNOSIS

Mahowald, Schenck, and Cramer Bornemann state:

The strength and merit of any argument does not reside in supporting or refuting the defendant's clinical diagnosis. Instead, the argument maintains focus on the component necessary for conviction or acquittal—*mens rea*... a forensic analysis of the accused degree of consciousness.<sup>1</sup>

We disagree with this statement. It is very important to determine the accused's level of consciousness during the episode *because* this helps the jury decide whether this is compatible with a parasomnic episode.

The definition of automatism given by Lord Denning in the case of *Bratty* states that automatism is:

An act which is done by the muscles without any control by the mind such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing such as an act done whilst suffering from concussion or whilst sleepwalking.<sup>8</sup>

Note that this definition is bipartite, covering both involuntariness and unconsciousness. The US Model Penal Code is similar:

The following are not voluntary acts within the meaning of this Section:

- (a) a reflex or convulsion;
- (b) a bodily movement during unconsciousness or sleep;
- (c) conduct during hypnosis or resulting from hypnotic suggestion;
- (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual. (Section 2.01(2))

The Latin aphorism *In somno voluntas non erat libera* (A sleeping person has no free will) sums up the legal approach to criminal responsibility and parasomnia. Thus the courts have consistently determined that the sleepwalker, regardless of the complexity of his actions, is acting involuntarily or unconsciously. It is therefore critical that an expert witness identifies a potential sleepwalking episode/parasomnia as there is established precedent on their disposal.

We accept that many of these points are about technical, legal definitions, but we are equally aware that medical

publications are regularly used by lawyers in preparing their cases and quoted in court. Clearly, every aspect of these articles will be scrutinised and challenged to confirm their accuracy. For these reasons, we believe it is important to have a correct understanding of the legal theory in order to frame expert testimony optimally.

## CITATION

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## SUBMISSION & CORRESPONDENCE INFORMATION

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